fiduciary relation between the parties. Such reasoning has led in some situations to unsupportable conclusions, of which a recent English case is an example. There it was decided that the husband of a life tenant of property subject to a mortgage, who bought it in at foreclosure, held it for the benefit of the remainderman. *Griffith* v. *Owen*, [1907] 1 Ch. 195.

The court seeks support for its decision in those cases where a trustee of a lease is not permitted to renew it for his own benefit, even though the lessor has refused to renew for the *cestui que trust*.[6] Analogous with these are the cases where a partner who renews a partnership lease for himself is made to hold for the benefit of his co-partner.[7] The principle of such cases, resting upon grounds of public policy,[8] is merely an application of the rule restricting the power of the trustee to deal with the trust *res*. But if the relation between life tenant and remainderman is not fiduciary, such authorities are not here in point. There is also an argument from those cases where a renewal by a life tenant of a lease with power of renewal is held to enure to the benefit of those in remainder.[9] But there the reason is not that there is a fiduciary relation between the parties, nor has such an explanation been generally given in the cases. The new lease is regarded merely as a graft upon the old, and the remainderman takes according to the original settlement.[10] Neither line of reasoning adopted by the court can sustain the conclusion of the case. The doctrine does, however, find considerable support in this country.[11]

Though it is hard to see why the life tenant should not ordinarily have the right to buy in the property at foreclosure and to hold it upon the same terms as any one else, yet if there is any fraud the situation is different. If the scheme is merely colorable to cut out those owning subsequent estates, the life tenant of course holds in trust. Many of the cases, and possibly the present case, might be explained on this ground. The trust does not arise, however, because of any fiduciary relation between the parties, but is an ordinary constructive trust raised because of the fraud. Permitting the land to be sold for taxes and then buying it in at the sale, is another example of the same practice, and the life tenant very properly is not permitted to cut out the remainderman in this way.[12] In short, the life tenant should not, through the power which his possession gives him, be permitted to gain any secret advantage over the remainderman.[13] This, it is believed, is as far as the remainderman can legitimately be protected.

EQUITABLE RELIEF FROM FORFEITURE OF A LEASE INCURRED BY BREACH OF COVENANT. — Equitable relief is often given from the forfeiture otherwise resulting from the breach of covenants in leases. It will be convenient first to consider the general situations where there has been neither accident, mistake, fraud, nor surprise. To summarize broadly the holdings of the

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[6] Keech *v.* Sandford, 2 Eq. Cas. Abr. 741.
[7] Featherstonhaugh *v.* Fenwick, 17 Ves. Jr. 298.
[8] See Blewett *v.* Millett, 7 Bro. P. C. 367, 373.
[9] Rawe *v.* Chichester, Ambl. 715.
[10] Taster *v.* Marriott, Ambl. 668.
[11] Bowen *v.* Brogan, 119 Mich. 218; Keller *v.* Fenske, 123 Wis. 435. See Cockrill *v.* Hutchinson, 135 Mo. 67. *Contra*, Fidelity, etc., Deposit Co. *v.* Dietz, *supra*. *Cf.* Rector of Christ Church *v.* Mack, 93 N. Y. 488.
[12] Varney *v.* Stevens, 22 Me. 331.
[13] See Nesbit *v.* Tredennick, 1 Ball & B. 29, 46.

cases, equity relieves from forfeiture incurred by breach of covenants to pay rent[1] or taxes,[2] but does not relieve when the covenant is to insure,[3] to repair,[4] not to assign or sublet without permission,[5] or to perform other collateral duties.[6] Of this result there is no explanation that is entirely satisfactory, when it is remembered that the sole object of equity's interference is to further justice.[7] It is difficult even to lay down an arbitrary rule stating when equity will act. It is frequently said that equity will relieve when the broken covenant was for the payment of money. But this is too general; it fails to provide, for example, for a recent holding that there will be no relief from a forfeiture due to the non payment of taxes, when as a result a third party has secured a *primâ facie* irredeemable tax title.[8] *Kahn* v. *King*, 204 U. S. 43. Another generalization commonly advanced is that the criterion is whether the lessor can be adequately compensated if equity relieves from the forfeiture. However, as Lord Eldon pointed out, equity will refuse relief in some situations where no question of compensation can be raised, as where an insolvent lessee assigns to one financially responsible.[9] A third statement is that where the performance of the broken covenant was the thing desired, and the forfeiture was inserted merely as security therefor or incidental thereto, equity will relieve. If we add to this the qualification that it must be possible to award the lessor such compensation that he gets substantially what he contemplated, we have, it is believed, the rule that comes nearest to covering the results of the decided cases.

There is talk in the authorities as to the effect of the lessee's conduct on his right to relief. It is conceded that his acts may be so culpable, and hence his hands so unclean, as to disentitle him to any consideration in equity.[10] Also, the improbability of his future performance may cause relief to be denied.[11] But, in general, the mere wilfulness of the breach will not bar the lessee from relief in cases where relief is ordinarily granted.[12] It is believed that "wilful" serves merely to distinguish the lessee's conduct in this class of cases from his conduct on those occasions on which he acted through accident or mistake, or was defrauded or surprised.[13] There is no doubt, however, that on the latter occasions relief is sometimes procured for the lessee by the *bona fides* of his conduct and its attendant circumstances, where ordinarily no relief would be granted. When in good faith he tries to perform his covenant, but is prevented by accident, — for instance, where continued unpropitious weather prevents outside repairs, — equity will not permit the forfeiture.[14] The same result is reached when the breach is due

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[1] Sheets *v.* Selden, 7 Wall. (U. S.) 416. Abrams *v.* Watson, 59 Ala. 524. But see Palmer *v.* Ford, 70 Ill. 369, 374.

[2] Giles *v.* Austin, 62 N. Y. 486.

[3] Green *v.* Bridges, 4 Sim. 96.

[4] Croft *v.* Goldsmid, 24 Beav. 312. *Cf.* Hagar *v.* Buck, 44 Vt. 285.

[5] Barrow *v.* Isaacs, [1891] 1 Q. B 417; Roberts *v.* Geis, 2 Daly (N. Y.) 535, 540.

[6] Hills *v.* Rowland, 4 DeG. M. & G. 430 (to use land in a certain way); Descarlett *v.* Dennett, 9 Mod. 22 (not to allow a way across premises).

[7] Perhaps because Parliament recognized that equity did not do substantial justice in all cases, the field is now covered by statute in England. 15 & 16 Vict., c. 76, §§ 210–212; 23 & 24 Vict., c 126, § 1; 44 & 45 Vict., c. 41, § 14.

[8] Gordon *v.* Richardson, 185 Mass. 492, reaches the same result when the tax title was still redeemable.

[9] Hill *v.* Barclay, 18 Ves. Jr. 56, 63. *Cf.* White *v.* Warner, 2 Meriv. 459.

[10] Bacon *v.* Park, 19 Utah 246.

[11] See Dunklee *v.* Adams, 20 Vt. 415, 422.

[12] See Henry *v.* Tupper, 29 Vt. 358, 372.

[13] See Gregory *v.* Wilson, 9 Hare 683, 689.

[14] Bargent *v.* Thomson, 3 Giff. 473.

to the lessee's pardonable mistake.[15] The court sometimes stretches this rather far to relieve in a hard case; but it is clear that mere forgetfulness cannot be considered mistake.[16] In these cases, also, it is a necessary prerequisite to the lessee's relief that the lessor can be properly compensated. Again, as a general rule, if the breach was caused by the lessor's fraud, or if he even innocently justified the lessee in believing that certain conditions in the lease were waived, so that the lessee in reliance on the supposed waiver broke his covenant, or if in general the lessor's conduct makes it unconscionable for him to take advantage of the breach, equity will relieve against the forfeiture.[17]

THE IDENTITY OF CRIMINAL OFFENSES. — It is a fundamental principle of criminal law that no one shall be twice put upon trial for the same offense. To prove identity, it is necessary to show that the offenses are the same in fact and in law.[1] Two exactly similar indictments may charge two distinct offenses in fact, and it is for the jury to determine by a comparison of the evidence whether identity exists. The more difficult problem is to determine whether the two offenses are the same in law. They may be distinct from each other, yet if both include the same offense they may give rise to double jeopardy. Thus, if one is equal to the other plus some new criminal element, or if they respectively equal the same crime plus a different criminal element, and if on a trial for either the merits of the common crime are passed on, such trial necessarily bars trial for the other.[2] A well-settled exception is that a conviction for battery will not bar a subsequent trial for homicide if the victim dies in the meantime.[3] The reasons given are unsatisfactory. As battery is an important element of homicide, a punishment for both offenses would clearly be a double punishment for the battery.

Offenses may be distinct because different in nature or in species, so that each is substantially a separate injury to the state. If no one criminal element is a necessary ingredient of both offenses, it is clear that the injury to the state is double.[4] Because the same evidence may be used to prove both offenses, it does not of necessity follow that the crimes are identical. Thus, one and the same act may be a violation of divers statutes, — as selling liquor without a license, selling liquor on Sunday, and selling liquor to a minor.[5] In a recent case under the Sherman Anti-Trust Act,[6] the defendant was convicted on two counts, one of which charged a combination in restraint of interstate commerce, and the other an attempt to monopolize a part of interstate commerce. The same evidence was used in support of both counts, and the defendant objected that but one offense was charged. Each offense, however, could be committed without committing the other. The first count charged merely the formation of a combination for the pur-

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15 Mactier *v.* Osborn, 146 Mass. 399.

16 Barrow *v.* Isaacs, *supra.*

17 Hughes *v.* Metropolitan Ry. Co., 2 App. Cas. 439; Thropp *v.* Field, 26 N. J. Eq. 82; Lilley *v.* Fifty Associates, 101 Mass. 432.

1 Com. *v.* Roby, 29 Mass. 496.

2 Hans Nielsen, Pet., 131 U. S. 176.

3 Rex *v.* Morris, 10 Cox C. C. 480; State *v.* Littlefield, 70 Me. 452

4 See Harrison *v.* State, 36 Ala. 248.

5 *Cf.* Com. *v.* Vaughan, 101 Ky. 603; Smith *v.* State, 105 Ga. 724.

6 26 Stat. at L. 209.